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February 25, 2005

Marlene H. Dortch, Secretary Federal Communications Commission Office of the Secretary 445 12th Street SW Washington, DC 20554

Re: Ex Parte Presentation – Computer III Further Remand Proceedings

(CC Dkt Nos. 95-20, 98-10)

Dear Ms. Dortch:

Attached please find a written *ex parte* presentation sent to FCC staff and filed this day electronically in the above-captioned dockets.

Please do not hesitate to call me if you have any questions.

Respectfully submitted,

/s/

Mark J. O'Connor Counsel for EarthLink, Inc. 1750 K Street NW Suite 600 Washington, DC 20006

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February 25, 2005

Via Email and Regular Mail

Ms. Ann Stevens Wireline Competition Bureau Federal Communications Commission 445 12th Street SW Washington, DC 20554

Re: Ex Parte Presentation – Computer III Further Remand Proceedings SBC

Petition for Declaratory Ruling or Waiver of OSS Same Access Requirement

(CC Dkt Nos. 95-20, 98-10)

Dear Ms. Stevens:

This letter is to respond to your question raised in our recent *ex parte* meeting regarding the "Petition for Declaratory Ruling or Waiver of OSS Same Access Requirement" filed by SBC on August 11, 2004 (the "SBC Petition") in above-referenced dockets. Specifically, you asked whether SBC provided EarthLink with data sufficient for EarthLink to determine whether it was receiving nondiscriminatory OSS should SBC provide its SBC-affiliated ISP with a direct access OSS while maintaining EarthLink's mediated access OSS, as described in the SBC Petition. After reviewing this matter with EarthLink operations personnel, EarthLink can report that the data it receives from SBC are inadequate to detect many forms of significant OSS discrimination that could occur were SBC to move forward with its plans described in the SBC Petition. For example, SBC could provide its affiliated ISP with superior access to or more accurate prequalification data, a more responsive interface (the current SBC automated interface provided to unaffiliated ISPs is typically down for 6 to 8 hours every night), access to other products or speeds, or better troubleshooting tools and neither EarthLink nor any other unaffiliated ISP (to EarthLink's knowledge) would have any knowledge of such critical advantages.

In reply, SBC argued that if unaffiliated ISPs find themselves at a competitive disadvantage due to the different OSS's contemplated by the SBC Petition, then ISPs "may avail themselves of the section 208 complaint process." SBC Reply Comments, at 7 (filed Oct. 19, 2004). If only SBC knows, however, what differences and advantages the direct OSS provides the affiliated ISP, then unaffiliated ISPs are left with inadequate information by which to assess adequately their Section 208 rights. Indeed, SBC proposes to turn *Computer III* on its head, by shifting the burden of proof of OSS "comparable efficiency" from the BOC, which possesses the

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relevant information, to the unaffiliated ISP, which does not.¹ Such a result would only invite further discrimination, and would surely conflict with the public interest.

Pursuant to the Commission's rules, one copy of this letter is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to call me if you have any questions.

Respectfully submitted,

/s/

Mark J. O'Connor Counsel for EarthLink, Inc.

CC (via email and regular mail):
Hillary De Nigro (FCC/EB)
Gary Phillips (SBC)
Keith Epstein (SBC)
Michael Alarcon

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¹ The Commission has specifically addressed that the "same" OSS would be required "until the BOCs can demonstrate that indirect access and direct access to the OSS services specified in that order are comparably efficient" In the Matter of Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 97, ¶ 4 (1993) (emphasis added).